Supreme Court, U.S.
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No. 01-728

IN THE
Supreme Court of the United States

MOUNTAIN WEST HELICOPTERS, LLC,

Petitioner,

v.

TEXTRON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED IN REPLY

1. Does a substantial federal question arise when a federal district court interprets federal law, in the form of the leading purely economic loss doctrine decision, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), in conflict with decisions of the third circuit court of appeals and this court, opines that the highest court of Idaho would follow that conflicting interpretation, and, thereafter, the court of appeals, "[f]or substantially the same reasons given by the district court," affirms the district court's conflicting interpretation, without further elaboration, and denies a motion to certify to Idaho the question whether it would follow the conflicting interpretation.

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REASONS FOR GRANTING THE WRIT

Textron does not challenge the merits of Mountain West's Petition. Instead it contends the "Petition presents no issue of federal law, no conflict with established Idaho law, no *true* split among the circuits, and no question that merits this court's review." Respondent's brief at 4 (emphasis supplied). Believing most of these issues are adequately addressed in the initial Petition for Writ of Certiorari, Mountain West focuses this reply brief on whether the Petition presents a substantial issue of federal law in the context of whether there is a split among the circuit courts, in their interpretation of federal law, that merits this court's review.

Mountain West submits a substantial issue of federal law arises when: (1) a federal district court interprets federal law, i.e, *East River* the leading purely economic loss doctrine decision, in a manner that conflicts with decisions both of the third circuit court of appeals and this court and then opines the highest court of Idaho will follow that conflicting interpretation; (2) thereafter the tenth circuit court of appeals affirms "for substantially the same reasons given by the district court," without additional elaboration and in spite of tenth circuit authority interpreting *East River* to the contrary; and (3) the court of appeals then also refuses to certify to Idaho, the question whether that state's highest court would follow an interpretation of federal law that conflicts with the majority position of *East River*.

This is a case wherein the district court articulated the only reviewable holding. The court of appeals made no holding but affirmed "for substantially the same reasons given by the district court." The substance of the holding follows.

> Textron argues that pursuant to Idaho law [Mountain West] cannot recover economic losses in products liability cases. In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), the Supreme Court denied

> recovery for economic loss in maritime cases holding that: "Since all but the very simplest of machines have component parts, [a contrary] holding would eliminate the distinction between warranty and strict products liability." *Id.* at 867. . . . Idaho, along with many other states, ha[s] extended this ruling holding . . . that claims for economic loss may not be pursued in a tort action. . . .
>
> . . . [E]conomic loss is not recoverable in these circumstances and therefore Textron's Motion for Summary Judgment is granted. . . .

App. at 7a-8a.

The trial court's conclusion, affirmed by the court of appeals, interprets federal law, in the form of *East River*, and then opines that Idaho will follow that interpretation. Textron acknowledges "[i]t is the business of this court to decide conflicts between the circuit courts over their interpretations of federal law." Respondent's brief at 3, citing *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law").

The district court's holding and the court of appeals' affirmation, in light of the facts relevant to this dispute, interpret federal law, in the form of *East River*, to stand for the proposition that damage caused to a defective product is not actionable in tort even if, as occurred here, the defect implicates the tort concern with safety by creating an unreasonable risk of harm to persons or property other than the product itself, and that harm actually materializes.

The trial court's interpretation of *East River*, affirmed by the tenth circuit court of appeals, conflicts with a third circuit decision, as this court recognized (and unanimously affirmed), holding that "damage . . . to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons

or property other than the product itself, and harm materializes." *East River*, 476 U.S. at 862 (emphasis supplied), citing *East River S.S. v. Delaval Turbine*, 752 F.2d 903, 908, 909-910 (3rd Cir. 1985).

The conflict, despite Textron's argument, is not illusory. It does not merely "represent . . . the different policies applied to a common question of tort law by different states and, in maritime cases, by the federal government." Respondent's brief at 3. Textron cites no Idaho decision (because no such decision exists) purporting to demonstrate that the tort policy of Idaho differs from the tort policy expressed in *East River*. Indeed the trial court concluded Idaho would follow *East River*.

The Restatement Third, Torts: Products Liability §21, *Comment d* at 297 recognizes *East River* is "the leading decision. . . ." At page10 of its tenth circuit brief Textron, in an assertion that it now appears to distance itself from, argues that *East River* is "the leading case barring recovery in tort for damage that a product does to itself. . . ." *East River* establishes that Textron's argument applies when the defective product does not implicate the tort concern with safety, by creating an unreasonable risk of harm to persons or property other than the product itself. Textron's argument does not apply, as *East River* recognizes, "when the defect creates an unreasonable risk of harm to persons or property other than the product itself, and [as occurred here] harm materializes." There is simply no question that *East River* is the case courts look to for guidance as to the majority position. "A strong majority of courts follow the *East River* [purely economic loss] rule. . . ." Restatement Third, Torts: Products Liability §21, *Comment d* at 298. The district court cited and quoted from *East River* in support of the decision it rendered herein.

Mountain West's inability to recover damages arises from a district court interpretation of *East River* in conflict with a third circuit decision that this court subsequently unanimously affirmed. The Petition for Certiorari asks the court to decide, among other things, a conflict between the third and tenth

circuit courts pertaining to their respective interpretations of federal law in the form of *East River*.

And finally, Textron makes much of the question whether this court should "review an issue of tort law . . . governed by the common law of the state of Idaho, when the decision of the circuit court below was unanimous. . . ." Respondent's brief at i. Not only was the court of appeals' decision unanimous, but it also agreed with the decision of the trial court. Hence the unanimity lies among four judges, not just the court of appeals' panel. Those four judges unanimously agreed, among other things, that damage to a defective product is not actionable in tort even if, as occurred here, the defect implicates the tort concern with safety by creating an unreasonable risk of harm to persons or property other than the product itself, and harm materializes.

A similarly unanimous court affirmed a third circuit holding that "damage . . . to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River*, 476 U.S. at 862 (emphasis supplied), citing *East River S.S. v. Delaval Turbine*, 752 F.2d 903, 908, 909-910 (3rd Cir. 1985). These two unanimous, but conflicting, decisions, of course, give rise to the question who is unanimously right and who is unanimously wrong?

CONCLUSION

As Dean Keeton recognized:

> A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms *only the*

> *product* should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage *limited solely to the property*, recovery should be available . . . on a contract-warranty theory.

32 Southwestern Law Journal 1, 5 (1978) (emphasis supplied). The damage caused by this hazardous product was not limited "only to the product itself" but included damage to "other property or persons" as well. Tort law seeks to protect against this type of harm through allocation of risk.

This court is the last opportunity Mountain West will have to obtain a correct interpretation of *East River*, a decision followed by a strong majority of jurisdictions, including, as the trial court recognized here, the state of Idaho. The correct interpretation of *East River* distinguishes between the hazardous product that harms something or someone, giving rise to tort claims, and the hazardous product that harms only the product itself, giving rise only to claims for breach of contract. Mountain West respectfully seeks the court's order granting its petition in order to resolve the conflicting interpretations of federal law as contained in the leading purely economic loss decision, *East River S.S. Corp. v. Transamerica Delaval, Inc.*

Respectfully submitted,

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